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LISA VIZCARRA,
Plaintiff,
vs.
UNILEVER UNITED STATES, INC.,
Defendant.

CASE NO. 4:20-cv-02777 YGR

**ORDER
DENYING MOTION FOR CLASS
CERTIFICATION WITHOUT PREJUDICE;
DENYING MOTION TO EXCLUDE OR
STRIKE EXPERT TESTIMONY;
RE: MOTIONS TO SEAL; AND
GRANTING MOTION TO FILE SUR-
REPLY**

Re: Dkt. Nos. 47, 48, 52, 55, 61

Plaintiff Lisa Vizcarra brings this proposed class action against Defendant Unilever United States, Inc. (“Unilever”) for claims arising out of Unilever’s allegedly misleading labeling of Breyers Natural Vanilla Ice Cream as containing vanilla flavor derived exclusively from the vanilla plant. Now before the Court is Vizcarra’s motion for certification of a proposed class under Rules 23(b)(2) and 23(b)(3), as well as Unilever’s motion to exclude or strike the opinions of Vizcarra’s survey expert, Dr. J. Michael Dennis. Having carefully considered the pleadings, the record, the parties’ briefs, and the argument presented at the hearing held on October 26, 2021, and for the reasons set forth below, the Court **DENIES** the motion for class certification **WITHOUT PREJUDICE** and it **DENIES** the motion to exclude or strike the opinions of Dr. Dennis.¹

¹ Unilever moves for leave to file a sur-reply brief on the ground that Vizcarra’s reply brief discusses a new theory of liability that is not alleged in the complaint and was not included in Vizcarra’s opening brief in support of her motion for class certification. *See Docket No. 61.* Vizcarra opposes the motion, arguing that it is not the case that Unilever’s reply discusses a new theory of liability. Because Vizcarra has not identified any prejudice that she would suffer if the Court were to consider Unilever’s proposed sur-reply, and because the Court finds that the sur-reply would assist its resolution of the issues presented in the motions before it, the Court **GRANTS** Unilever’s motion for leave to file a sur-reply.

1 **I. MOTIONS TO SEAL**

2 As a preliminary matter, both sides have submitted administrative motions to seal
3 documents or portions of documents offered in support of their class certification briefing. *See*
4 Docket Nos. 48, 55. While the standard for sealing documents in connection with class
5 certification does not require “compelling reasons” as set forth in *Pintos v. Pacific Creditors*
6 Ass’n, 605 F.3d 665, 678 (9th Cir. 2010), the Court nevertheless finds that the sealing requests
7 here are overbroad and good cause has not been established to seal certain documents to the extent
8 requested. The Court has considered the basis offered for sealing, as well as the significance to
9 the Court’s decision of the portions sought to be sealed, in determining which portions to cite or
10 quote in its order herein. The motions to seal are granted only insofar as they are not necessary to
11 the Court’s analysis.

12 Therefore, to the extent that the Court has quoted or recited in this opinion the contents of
13 any specific portion of a document or material subject to a motion to seal, the Court **DENIES** the
14 motion to seal that information for lack of good cause. The motions to seal, Docket Nos. 48, 55,
15 are otherwise **GRANTED** for good cause shown.

16 **II. BACKGROUND**

17 The following are allegations from the operative complaint, Docket No. 1.

18 Unilever sells Breyers Natural Vanilla Ice Cream (“the ice cream at issue”) in cartons, the
19 front label of which “said ‘Natural Vanilla’ in large, light green letters against a black background,
20 contained pictures of two vanilla beans and vanilla flowers and a scoop of the ice cream with
21 noticeable specks purporting to be actual vanilla beans.” *Id.* ¶ 12. Vizcarra allegedly relied on
22 these representations (“Vanilla Representations”) when purchasing the ice cream at issue, which
23 led her to believe that the ice cream’s vanilla flavor “would come only from the vanilla plant,” *id.*,
24 even though some of the vanilla flavor is derived from non-vanilla plant sources, *id.* ¶ 27.
25 Vizcarra alleges that she would not have purchased or paid more for Breyers Natural Vanilla Ice
26 Cream had she realized that much, if not all, of its vanilla flavor comes from non-vanilla-plant
27 sources. *Id.* ¶ 7. Vizcarra would purchase Breyers Natural Vanilla Ice Cream again in the future
28

1 if the product “were remedied to reflect Defendant’s labeling and marketing claims for it.” *Id.*
2 ¶ 12.

3 In the complaint, Vizcarra asserts the following claims on her own behalf and on behalf of
4 a proposed class of consumers in California who purchased Breyers Natural Vanilla Ice Cream for
5 personal use from April 21, 2016, to the present: (1) claims under the unlawful, unfair, and
6 fraudulent prongs of the Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, *et*
7 *seq.*; (2) a claim for false and misleading advertising in violation of California’s False Advertising
8 Law (“FAL”), Cal. Bus. & Prof. Code § 17500, *et seq.*; and (3) a claim for violations of the
9 Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750, *et seq.* Vizcarra seeks
10 damages “and an injunction to stop Unilever’s false and misleading marketing practices with
11 regard to Breyers Natural Vanilla Ice Cream,” *id.* ¶ 9, among other remedies.

12 On July 16, 2020, the Court denied Unilever’s motion under Rule 12(b)(6) and Rule
13 12(b)(1) to dismiss Vizcarra’s claim for damages under the CLRA, her claim under the unlawful
14 prong of the UCL, and her request for injunctive relief. Docket No. 30. The present motions
15 follow.

16 III. LEGAL STANDARD

17 A. ***Daubert* Motion Standard**

18 Federal Rule of Evidence 702 permits opinion testimony by an expert as long as the expert
19 is qualified and his or her opinion is relevant and reliable. An expert witness may be qualified by
20 “knowledge, skill, experience, training, or education.” Fed. R. Evid. 702.

21 “[I]n evaluating challenged expert testimony in support of class certification, a district
22 court should evaluate admissibility under the standard set forth in” *Daubert v. Merrell Dow*
23 *Pharm., Inc.*, 509 U.S. 579, 589-90 (1993). *Grodzitsky v. Am. Honda Motor Co.*, 957 F.3d 979,
24 985 (9th Cir. 2020) (citation omitted). A court may exclude expert testimony submitted in support
25 of class certification if it does not comply with the standards set forth in *Daubert*. *See id.*

26 “Under *Daubert*, ‘the district court judge must ensure that all admitted expert testimony is
27 both relevant and reliable.’” *Id.* (quoting *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232
28 (9th Cir. 2017)). “Scientific evidence is reliable if the principles and methodology used by an

1 expert are grounded in the methods of science.” *Wendell*, 858 F.3d at 1232 (citation and internal
2 quotation marks omitted). “The focus of the district court’s analysis must be solely on principles
3 and methodology, not on the conclusions that they generate,” and “the court’s task is to analyze
4 not what the experts say, but what basis they have for saying it.” *Id.* (citations, alteration, and
5 internal quotation marks omitted). In conducting this analysis, the district court may consider
6 “whether the theory or technique employed by the expert is generally accepted in the scientific
7 community; whether it’s been subjected to peer review and publication; whether it can be and has
8 been tested; and whether the known or potential rate of error is acceptable.” *Id.* (citation omitted).

9 **B. Motion for Class Certification**

10 A class action is “an exception to the usual rule that litigation is conducted by and on
11 behalf of the individual named parties only.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013)
12 (quotations omitted). “Before certifying a class, the trial court must conduct a rigorous analysis to
13 determine whether the party seeking certification has met the prerequisites of Rule 23.” *Mazza v.*
14 *Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012) (internal quotation marks omitted).
15 The rigorous analysis that a court must conduct requires “judging the persuasiveness of the
16 evidence presented” for and against certification and “resolv[ing] any factual disputes necessary to
17 determine whether” the requirements of Rule 23 have been satisfied. *Ellis v. Costco Wholesale*
18 *Corp.*, 657 F.3d 970, 982-83 (9th Cir. 2011). A “district court must consider the merits if they
19 overlap with the Rule 23(a) requirements.” *Id.* (citations omitted).

20 The party moving for certification first must show that the four requirements of Rule 23(a)
21 are met. Specifically, Rule 23(a) requires a showing that: (1) the class is so numerous that joinder
22 of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the
23 claims or defenses of the representative parties are typical of the claims or defenses of the class;
24 and (4) the representative parties will fairly and adequately protect the interests of the class. Fed.
25 R. Civ. P. 23(a).

26 The party moving for certification must then show that the class can be certified based on
27 at least one of the grounds in Rule 23(b). *See* Fed. R. Civ. P. 23(b). As relevant here, certification
28 under Rule 23(b)(2) is appropriate only if “the party opposing the class has acted or refused to act

1 on grounds that apply generally to the class, so that final injunctive relief or corresponding
2 declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2).
3 Certification under Rule (b)(3) is appropriate only if “the questions of law or fact common to class
4 members predominate over any questions affecting only individual members” and “a class action
5 is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed.
6 R. Civ. P. 23(b)(3).

7 **IV. DISCUSSION**

8 The Court first turns to Unilever’s motion to exclude or strike the opinions of Vizcarra’s
9 survey expert, Dr. Dennis. Docket No. 55-8. The Court then turns to Vizcarra’s motion for class
10 certification. Docket No. 48-4.

11 **A. Daubert Motion as to Dr. Dennis**

12 Unilever moves to exclude or strike the opinions of Dr. J Michael Dennis, Vizcarra’s
13 survey expert, under Federal Rule of Evidence 702 and *Daubert*. Alternatively, Unilever argues
14 that Dr. Dennis’ opinions should be given no weight in the class certification analysis.

15 Before turning to Unilever’s arguments, the Court first provides an overview of Dr.
16 Dennis’ opinions. Dr. Dennis submitted an expert report in support of Vizcarra’s motion for class
17 certification. Dennis Report, Docket No. 47-2. Dr. Dennis acknowledges that Vizcarra’s claims
18 in this action arise out of the Vanilla Representations, which are labeled in the report as either “the
19 alleged misrepresentations” or as “the Vanilla Representations.” *Id.* ¶ 13. The report refers to the
20 ice cream at issue as “the Product.” *Id.* The report provides that Vizcarra alleges that “the
21 Product’s packaging (displayed in Exhibit 1) communicates that all the vanilla flavor is sourced
22 from the vanilla plant *through the use of various descriptors and images*, namely the use of the
23 words ‘Natural Vanilla,’ the image of vanilla plant flowers, the image of vanilla beans, and the
24 image of ice cream with black specks (the ‘*Vanilla Representations*’).” *Id.* ¶ 13 (emphasis added).
25 It further provides that Vizcarra alleges that, “to the extent that the market price for the Product is
26 the result of the alleged misrepresentations, class members were economically harmed.” *Id.*

27 Dr. Dennis’ assignment was three-fold: (1) to conduct a consumer survey to determine
28 whether “consumers perceived *the Product’s packaging* that displayed the Vanilla Representations

1 to communicate that all the vanilla flavor is sourced from vanilla extract (made from the vanilla
2 plant); (2) “to measure whether the alleged misrepresentations were material to consumers’
3 decisions to purchase the Product”; and (3) “to provide a plan for designing, executing, and
4 reporting on a price premium survey for measuring any economic value solely attributable to the
5 alleged misrepresentations.” *Id.* ¶ 14 (emphasis added).

6 The first part of Dr. Dennis’ report describes the “consumer perceptions survey” he
7 conducted. Dr. Dennis surveyed more than 900 California past-year purchasers of vanilla-flavored
8 ice cream and Breyers-branded ice cream, *id.* ¶¶ 28, 41, to determine whether “consumers
9 perceived the Product’s packaging that displayed the Vanilla Representations to communicate that
10 all the vanilla flavor is sourced from vanilla extract (made from the vanilla plant),” *id.* ¶ 14. The
11 survey involved showing respondents images of the front of the package of the ice cream at issue,
12 which contained not only the Vanilla Representations, but also other statements and elements not
13 challenged by Vizcarra in this action, *id.* ¶ 50, as well as images of the sides of the packaging,
14 which contained multiple statements and elements not challenged by Vizcarra and none of the
15 Vanilla Representations, *id.* ¶ 51. After showing these images to respondents, respondents were
16 asked: “What is your EXPECTATION about whether all or not all of the vanilla flavor comes
17 from vanilla extract (made from the vanilla plant)?” *Id.* ¶ 55. The three possible responses were
18 “not all of the vanilla flavor,” “all of the vanilla flavor,” and “not sure.” *Id.* The survey results
19 show that 79.9% of respondents expected based on the packaging of the ice cream at issue that “all
20 of the vanilla flavor” comes from the vanilla plant; 14.5% expected that “not all of the vanilla
21 flavor” comes from the vanilla plant; and 5.7% indicated that they were not sure. *Id.* ¶ 20. Dr.
22 Dennis concluded based on these survey results “that a reasonable consumer in the state of
23 California perceives *the Product’s packaging* to convey that all the vanilla flavor comes from
24 vanilla extract (made from the vanilla plant).” *Id.* ¶ 74 (emphasis added).

25 The second part of Dr. Dennis’ report describes a materiality survey he conducted (which
26 he labeled the “Materiality (Referendum) Survey”), which sought to measure “any materiality
27 associated with consumers’ preference to purchase Product for which all the vanilla flavor comes
28 from vanilla extract (made from the vanilla plant).” *Id.* ¶ 73. The survey involved showing

1 images of the packaging of the ice cream at issue to respondents (both the front label and the side
2 labels of the packaging) and then asking them to assume that Ice Cream A and Ice Cream B are
3 identical in all respects except in terms of the source of the vanilla flavor in the ice cream, where
4 one of those hypothetical products had “all of the vanilla flavor” derived from vanilla extract, and
5 the other had “not all of the vanilla flavor” derived from the vanilla extract. *Id.* ¶ 62. The survey
6 asked respondents to choose one of the two hypothetical ice cream products to purchase. *Id.* ¶ 63.
7 Dr. Dennis’ study showed that “consumers, with respect to *purchasing vanilla ice cream*, place
8 importance on the attribute regarding the source of the vanilla flavor.” *Id.* ¶ 24 (emphasis added).
9 The survey showed that 88.6% of respondents prefer to purchase a vanilla ice cream product for
10 which all of the vanilla flavor comes from the vanilla plant, that only 6.7% of consumers prefer to
11 purchase a vanilla ice cream product for which “not all” of the vanilla flavor comes from the
12 vanilla plant, and that 4.7% indicated that they do not know their preference. *Id.* ¶ 24. Dr. Dennis
13 concluded, based on these survey results, “that the alleged misrepresentations are material to
14 purchase decision making [sic] for a reasonable consumer in the state of California.” *Id.* ¶ 75.

15 The third part of Dr. Dennis’ report describes a “methodology for conducting a price
16 premium survey and analysis” to measure “the extent to which class members paid a price
17 premium as a result of being misled into believing that all of the vanilla flavor of the Product is
18 from the vanilla plant.” *Id.* ¶¶ 77-78. Dr. Dennis opines that “[t]he market price premium
19 attributable to the challenged claim can be determined through one or more conjoint surveys,” *id.*
20 ¶ 79, which he describes as “a methodology that is capable of isolating and measuring the value of
21 an individual product attribute such as a specific understanding of a challenged claim,” *id.* ¶ 87.
22 Choice-based conjoint analysis utilizes a survey where respondents are presented with various
23 choices of product attributes, prices, and alternatives; respondents are asked to rank their
24 preferences, which allows researchers to then apply statistical methods, including regression
25 analysis, to value those attributes in the market. *Id.* ¶¶ 84-105.

26 Specifically, Dr. Dennis explains that:

27 In a conjoint survey, survey participants are presented with a
28 “choice exercise” in which they are typically shown a set of 3 or 4
hypothetical products and asked to choose which of the products, if

any, they would purchase. The hypothetical products in conjoint surveys are typically comprised of 6 to 8 “attributes” that reflect attributes that consumers consider in making purchasing decisions. For consumer packaged goods, attributes that consumers typically consider in their purchasing decisions include things like product brand, packaging claims, product size and, of course, price. . . .

For each product attribute, there are various “levels” of the attribute. For example, if a conjoint was considering golf balls, attributes might be model and brand, performance, and price. . . .

The levels for each product attribute are systematically randomized so that the hypothetical product choices respondents are presented with will have a mix of products with different combinations of attribute levels. . . .

Based on respondents’ choice of a specific product (or selecting no product) their preferences for specific attributes and the attribute levels are revealed. By having each survey respondent repeat the choice task 12 to 20 separate times (each with a unique set of products with systematically varied levels of the attributes) and having a statistically significant number of survey respondents (typically in the hundreds), the choices made by survey respondents will provide thousands of data points from which the market price premium attributable to a particular attribute can ultimately be determined.

This is done through the use of hierarchical Bayes regression analysis which processes the survey data, along with information about historical prices, and by the use of a market simulator that not only includes information on consumer choice (demand-side factors) but also supply-side factors such as historical sales and pricing. When performed in this manner, a reliable estimate of the real-world market price premium attributable to a product attribute can be calculated.

Id. ¶¶ 88-92. Dr. Dennis represents that his proposed, but not-yet-executed, conjoint analysis will be based on the methodology just described and will seek to measure the price premium associated with being misled into believing that all of the vanilla flavor of the ice cream at issue is from the vanilla plant. *Id.* ¶¶ 93-136. Dr. Dennis states that he intends to rely on documents and pricing and other data produced in this litigation, and other information relevant to the claims in this action, to ensure that his proposed price premium analysis accurately captures both demand-side and supply-side factors to determine the price premium associated with the alleged deception in this action. *See id.* ¶¶ 97, 120. This would include taking into account real-world pricing of the products sold during the class period. *Id.* ¶¶ 120, 132.

1 Nowhere in his report does Dr. Dennis state that he has tested or isolated, or intends to test
2 or isolate, the impact of the Vanilla Representations on respondents' expectations of the source of
3 the vanilla flavor in the ice cream at issue or respondents' purchasing decisions. Nor does he state
4 that he intends to isolate or determine the price premium, if any, caused by the Vanilla
5 Representations. Instead, as noted above, his consumer and materiality surveys rely on showing
6 respondents images of *the entire package* of the ice cream at issue (both the front label and the
7 side labels, which include statements and elements not challenged by Vizcarra). Dr. Dennis'
8 proposed conjoint analysis will determine the price premium associated with an attribute he calls
9 "source of vanilla flavor" but it will not determine the price premium, if any, caused by the
10 Vanilla Representations. *See* Dennis Dep. Tr. at 59-61.

11 Unilever moves to exclude or strike all three parts of Dr. Dennis' report. Docket No. 55-8.
12 As to the first part of the report, which describes the consumer perception study, Unilever argues
13 that (1) it does not speak as to whether the Vanilla Representations were likely to deceive
14 consumers, because it does not test the effect of the Vanilla Representations and instead tests the
15 entire package of the ice cream at issue; (2) the survey uses leading and biased questions; and (3)
16 the survey lacks adequate controls.

17 As to the second part of Dr. Dennis' report, the materiality survey, Unilever argues that (1)
18 it does not speak as to whether the Vanilla Representations would be material to consumers in
19 their purchasing decisions because it does not test the materiality of the Vanilla Representations;
20 (2) it does not replicate market conditions; and (3) the questions used are biased.

21 As to the third part of Dr. Dennis' report, the proposed conjoint analysis, Unilever argues
22 that (1) it does not match Vizcarra's theory of liability as required by *Comcast*, because it will not
23 measure any price premium caused by the Vanilla Representations, as Dr. Dennis does not
24 propose to isolate the effect of the Vanilla Representations on consumers' decision to purchase the
25 ice cream at issue; (2) Dr. Dennis' description of his proposed conjoint analysis is too vague to
26 allow meaningful analysis for the purpose of determining whether the requirements for class
27 certification are met; and (3) the proposed study does not properly incorporate supply-side factors.
28

1 Vizcarra opposes the motion, arguing that Unilever's challenges as to Dr. Dennis'
2 methodologies go to the weight to be given to his opinions, and not to their admissibility. Docket
3 No. 59.

4 The Court concludes that Unilever has not shown that Dr. Dennis' opinions are subject to
5 exclusion at this stage of the litigation. Unilever's objections as to Dr. Dennis' survey design,
6 methodologies, and reliability go to the weight to be given to Dr. Dennis' opinions, and not their
7 admissibility. *See Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d
8 1025, 1038 (9th Cir. 2010) (holding that, in the context of survey evidence, criticisms as to "issues
9 of methodology, survey design, reliability . . . [and] critique of conclusions" "go to the weight of
10 the survey rather than its admissibility") (citation and internal quotation marks omitted); *see also*
11 *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1033 (C.D. Cal. 2018) (holding that
12 criticisms based on expert's survey methodology, such as omitting a control group and asking
13 suggestive or vague questions, go to the weight, not the admissibility, of the expert's survey);
14 *Pettit v. Procter & Gamble Co.*, No. 15-cv-02150 RS, 2017 WL 3310692, at *4 (N.D. Cal. Aug. 3,
15 2017) ("While the parties vigorously dispute whether the Dennis survey was properly conducted
16 and produced reliable results, P&G's complaints go to the weight of the evidence, and do not
17 preclude its admissibility."). Accordingly, the Court **DENIES** Unilever's motion to strike or
18 exclude.

19 As will be discussed in more detail below, however, the opinions of Dr. Dennis upon
20 which Vizcarra relies to support her motion for class certification have no persuasive value in the
21 context of the class certification analysis, because Dr. Dennis did not specifically test the effect of
22 the Vanilla Representations on consumers' beliefs or purchasing decisions, or on whether
23 consumers paid any price premium attributable to such alleged misrepresentations.

24 **B. Motion for Class Certification**

25 Vizcarra moves for class certification under Rules 23(b)(2) and 23(b)(3) based on her
26 claims under the UCL, FAL, and CLRA.

27 In her class certification motion, Vizcarra seeks to certify the following proposed class
28 under Rules 23(b)(2) and 23(b)(3):

1 All persons who purchased Breyers Natural Vanilla Ice Cream in
2 the State of California at any time from April 21, 2016 through the
final disposition of this Action.

3 Docket No. 48-4 at 1. Excluded from the proposed class are: “governmental entities; Defendant;
4 any entity in which Defendant has a controlling interest; Defendant’s officers, directors, affiliates,
5 legal representatives, employees, successors, subsidiaries, and assigns; and any judge, justice, or
6 judicial officer presiding over this matter and the members of their immediate families and judicial
7 staff.” *Id.*

8 In her motion for certification, Vizcarra argues, and Unilever does not dispute, that all
9 members of the proposed class were exposed to the Vanilla Representations, because “Defendant
10 labelled each and every Product with the same Vanilla Representations.” Docket No. 48-4 at 3;
11 *see also id.* at 2 (“All consumers in the proposed class saw the same Vanilla Representations on
12 the Product’s label throughout the Class Period.”).

13 **A. Rule 23(a)**

14 **1. Numerosity**

15 The requirement of numerosity is that the class be so numerous that joinder of all members
16 individually would be impracticable. Fed. R. Civ. P. 23(a)(1). “Although there is no exact
17 number, some courts have held that numerosity may be presumed when the class comprises forty
18 or more members.” *See Krzesniak v. Cendant Corp.*, No. 05-05156, 2007 WL 1795703, at *7
19 (N.D. Cal. June 20, 2007).

20 Plaintiff contends that this requirement is satisfied because Unilever sold tens of thousands
21 of units of the ice cream at issue in California during the Class Period. *See* Docket No. 48-4 at 7.

22 Unilever does not credibly dispute this representation.

23 In the absence of any dispute as to the numerosity of the proposed class, the Court
24 concludes that Vizcarra has satisfied the numerosity requirement.

25 **2. Commonality**

26 Commonality requires “questions of law or fact common to the class.” Fed. R. Civ. P.
27 23(a)(2). To satisfy this requirement, the common question must be of “such nature that it is
28 capable of class-wide resolution—which means that the determination of its truth or falsity will

1 resolve an issue that is central to the validity of each of the claims in one stroke.” *Wal-Mart*
2 *Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). “[F]or purposes of Rule 23(a)(2)[,] even a single
3 common question will do.” *Id.* at 359 (internal quotations and brackets omitted). The
4 requirements of Rule 23(a)(2) have “been construed permissively,” and “[a]ll questions of fact and
5 law need not be common to satisfy the rule.” *Ellis*, 657 F.3d at 981 (quoting *Dukes*, 564 U.S. at
6 350). A district court must analyze the persuasiveness of evidence submitted to establish the
7 commonality requirement and may not simply conclude that the commonality requirement is met
8 on the basis that the plaintiff’s evidence in support of that requirement is admissible. *See*
9 *Grodzitsky*, 957 F.3d at 986 (holding that “[a] district court errs when it ‘limit[s] its analysis of
10 whether there was commonality to a determination of whether Plaintiffs’ evidence on that point
11 was admissible” and that a “district court must engage in a ‘rigorous analysis’ of commonality,
12 rather than ‘merely conclud[ing] that, because . . . evidence was admissible, a finding of
13 commonality was appropriate’”) (quoting *Ellis*, 657 F.3d at 984).

14 Here, Vizcarra argues that the commonality requirement is met because two questions that
15 are “integral” to her claims under the UCL, FAL, and CLRA, “can be resolved with common
16 proof,” namely (1) “the question of whether the Vanilla Representations were likely to deceive
17 reasonable consumers; and (2) whether the Vanilla Representations were material to reasonable
18 consumers.” Docket No. 48-4 at 8. The only common evidence to which Vizcarra points as being
19 capable of answering these questions is the expert report of Dr. Dennis.

20 The Court analyzes each of these questions in turn and concludes that Vizcarra has not
21 shown that they are susceptible to resolution with common proof. Accordingly, the commonality
22 requirement is not met.

23 **i. UCL and FAL and Likelihood of Deception**

24 The UCL prohibits any “unlawful, unfair or fraudulent business act or practice.” Cal. Bus.
25 & Prof. Code § 17200. The FAL prohibits any “unfair, deceptive, untrue, or misleading
26 advertising.” Cal. Bus. & Prof. Code § 17500. The language of these statutes is “broad” and
27 “sweeping” to ‘protect both consumers and competitors by promoting fair competition in

commercial markets for goods and services.”” *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 985 (9th Cir. 2015) (quoting *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 320 (2011)).

“[T]o state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, it is necessary *only* to show that members of the public are likely to be deceived.”² *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011), *abrogated on other grounds by Comcast*, 133 S. Ct. at 1426 (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009)) (emphasis added). This standard is governed by whether a “reasonable consumer” is likely to be deceived. *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (“[T]he false or misleading advertising and unfair business practices claim must be evaluated from the vantage of a reasonable consumer.”) (citation omitted). “‘Likely to deceive’ implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.” *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003); *see also Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (relying on *Lavie* to hold that the reasonable consumer standard for likelihood of deception “requires more than a mere possibility that [the alleged misrepresentation] ‘might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner’” and instead requires a probability “‘that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled’”) (quoting *Lavie*, 105 Cal. App. 4th at 508).³

² This standard is generally applied in the context of UCL claims brought under the fraudulent prong. This is the only standard that Vizcarra cited in her briefs as being relevant to the certification of her UCL claims. Accordingly, the Court proceeds under the assumption that Vizcarra seeks certification only of her fraudulent prong claim under the UCL.

³ Because the UCL and FAL limit available remedies to injunctive relief, including restitution, a plaintiff suing under the UCL or FAL need not show actual falsity of the alleged misrepresentations or reliance by the plaintiff. *See Pulaski & Middleman*, 802 F.3d at 986 (holding that the inquiry for a UCL and FAL claim does not require proof of deception, reliance, and injury) (citation and internal quotation marks omitted). This contrasts with a common law claim for damages based on fraud, for which actual falsity, reliance, and injury are required elements. *Id.*

1 Here, Vizcarra argues that the question of whether the Vanilla Representations were likely
2 to deceive a reasonable consumer can be resolved with common proof, namely the opinions of Dr.
3 Dennis. *See* Docket No. 48-4 at 3. As noted above, Dr. Dennis' consumer perceptions survey
4 shows that 79.9% of respondents expected, based on the packaging of the ice cream at issue, that
5 "all of the vanilla flavor" comes from the vanilla plant; 14.5% expected that "not all of the vanilla
6 flavor" comes from the vanilla plant; and 5.7% were not sure. Dennis Report ¶ 20. Dr. Dennis
7 concluded based on these survey results "that a reasonable consumer in the state of California
8 perceives *the Product's packaging* to convey that all the vanilla flavor comes from vanilla extract
9 (made from the vanilla plant)." *Id.* ¶ 74 (emphasis added).

10 Unilever argues that Dr. Dennis' opinions are not capable of answering the question of
11 whether a reasonable consumer was likely to be deceived by the Vanilla Representations because
12 Dr. Dennis did not actually test the effect of the Vanilla Representations on consumers' views or
13 expectations. Docket No. 55-4. Instead of testing the effect of the Vanilla Representations, Dr.
14 Dennis tested *the entire package* of the ice cream at issue, which includes the Vanilla
15 Representations as well as other elements that are not challenged by Vizcarra in the complaint. To
16 support this argument, Unilever points to the opinions of its own market research expert, Dr.
17 Oliver Toubia, who was tasked with evaluating the validity Dr. Dennis' opinions. Dr. Toubia
18 Report, Docket No. 54-1. Dr. Toubia opines that Dr. Dennis' survey cannot measure or isolate the
19 effect, if any, of the at-issue Vanilla Representations on consumer perceptions, because it lacks an
20 adequate control group, namely one that tested a stimulus that "shares as many characteristics with
21 the experimental stimulus as possible, with the key exception of the characteristic whose influence
22 is being assessed." Docket No. 54-1 ¶ 26. Dr. Toubia opines that, as a result of lacking a relevant
23 control group, the survey cannot determine whether the four at-issue Vanilla Representations
24 caused respondents' perceptions about the source of the flavor, "separate from other factors such
25 as preexisting beliefs about vanilla ice cream or the Breyers brand in general." *Id.* ¶ 25. Unilever
26 also contends that Dr. Dennis admitted during his deposition that he failed to isolate the effect of
27 the Vanilla Representations, and that his survey results therefore speak as to the effect of the entire
28 package, and not the Vanilla Representations specifically. *See* Dennis Dep. Tr. at 57 ("I did not

1 attempt to isolate any one of these vanilla representations. So, therefore, my survey results to date
2 are, are speaking to the entire packaging there.”).

3 Vizcarra does not dispute that Dr. Dennis did not test the Vanilla Representations to
4 determine whether the Vanilla Representations would have led a reasonable consumer to believe
5 that the vanilla flavor of the ice cream at issue came exclusively from the vanilla plant, and she
6 admits that Dr. Dennis tested *the entire package* of the ice cream at issue instead. *See* Docket No.
7 59 at 5 (admitting that Dr Dennis’ “survey questions tested the Plaintiff’s allegation that
8 consumers perceived *the Product’s packaging* to communicate that all the vanilla flavor comes
9 from vanilla extract (made from the vanilla plant).”) (emphasis added). Vizcarra also does not
10 challenge Dr. Toubia’s opinions that, to properly isolate and test the effect of the Vanilla
11 Representations, Dr. Dennis should have tested a stimulus that removed the Vanilla
12 Representations but was otherwise identical to the package of the ice cream at issue, and that Dr.
13 Dennis’ failure to isolate the Vanilla Representations in that manner means that his survey results
14 cannot speak as to whether the Vanilla Representations caused respondents’ perceptions about the
15 source of the vanilla flavor. In reply, Vizcarra merely disagrees arguing that Unilever “does not
16 contest” that the question of likelihood of deception can be resolved with common proof, Docket
17 No. 58 at 3, and that it was not inappropriate for Dr. Dennis to test the entire package instead of
18 the Vanilla Representations, because her theory of liability is premised on “the entire Product
19 label,” Docket No. 58 at 9.

20 As a threshold matter, the Court is not persuaded that Unilever “does not contest” that the
21 question of likelihood of deception can be resolved with common proof. As noted above,
22 Unilever vigorously contests that issue.

23 The Court also is not persuaded by Vizcarra’s current argument that her theory of liability
24 as alleged in the complaint is based on *the entire label* of the ice cream at issue as opposed to the
25 Vanilla Representations that appeared on the front label of the package. In the complaint,
26 Vizcarra does not allege that she relied on the entire label of the package when deciding to
27 purchase the ice cream at issue. Instead, Vizcarra alleges that she relied on the specific Vanilla
28 Representations, namely: the statement “natural vanilla,” and images of vanilla plant flowers and

1 beans, and a scoop of ice cream with dark specs. *See* Docket No. 1 ¶ 12 (“The front of the cartons
2 said “Natural Vanilla” in large, light green letters against a black background, contained pictures
3 of two vanilla beans and vanilla flowers and a scoop of the ice cream with noticeable specks
4 purporting to be actual vanilla beans. *Plaintiff relied upon these representations* when Plaintiff
5 purchased Breyers Natural Vanilla Ice Cream.”) (emphasis added). While the complaint contains
6 allegations that the Vanilla Representations appeared on the front of the package of the ice cream
7 at issue, that does not change the fact that Vizcarra claims to have relied specifically on the
8 Vanilla Representations, and *not* on the entire label of the package. Vizcarra’s contention that her
9 theory of liability is based on the entire label of the package instead of the Vanilla
10 Representations, therefore, is contradicted by the allegations in the complaint.⁴

11 Further, Vizcarra’s contention that her theory of liability is based on the entire label of the
12 package is contradicted by her own opening brief in support of her motion for class certification.
13 *See, e.g.*, Docket No. 47 at 1 (stating that, based “the statement ‘Natural Vanilla’ and images of
14 vanilla plant flowers and beans, and a scoop of ice cream with noticeable dark specks (the ‘Vanilla

16 ⁴ Even if Vizcarra wished to proceed at this juncture with a theory of liability premised on
17 the *entire* package of the ice cream at issue without identifying any specific elements or statements
18 thereon, she has not shown that she could do so. Where, as here, UCL, FAL, and CLRA claims
19 are premised on alleged misrepresentations in product packaging or advertising, the claims are
said to sound in fraud; accordingly, courts routinely hold that the claims must be pleaded with the
heightened degree of particularity required by Rule 9(b), which requires, among other things, that
the plaintiff identify the *specific* statements or images on that label that are allegedly misleading.
20 *See, e.g.*, *Maisel v. S.C. Johnson & Son, Inc.*, No. 21-cv-00413, 2021 WL 1788397, at *7-8 (N.D.
21 Cal. 2021) (“Rule 9(b)’s heightened pleading standard applies to UCL, FAL, and CLRA causes of
22 actions because they “are ‘grounded in fraud’ or ‘sound in fraud.’”); *Kearns v. Ford Motor Co.*,
23 567 F.3d 1120, 1125 (9th Cir. 2009) (same); *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir.
24 2007) (“Federal Rule of Civil Procedure 9(b) requires more specificity including an account of the
‘time, place, and *specific content of the false representations* as well as the identities of the parties
25 to the misrepresentations”’) (citation omitted) (emphasis added). Vizcarra has not shown that a
plaintiff can satisfy these pleading requirements, and avoid dismissal of her UCL, FAL, and
26 CLRA claims, without identifying the specific statements or elements on a product that are
allegedly misleading. Additionally, even if Vizcarra *could* proceed on a theory of liability that was
27 premised on the entire package without identifying specific misleading statements or elements,
certification of the proposed class would nevertheless fail for lack of evidence of uniform
exposure to the same allegedly misleading representations. *See Mazza*, 666 F.3d at 596 (holding
28 that “the relevant class must be defined in such a way as to include only members who were
exposed to advertising that is alleged to be materially misleading”). Unilever argues that not all
members of the proposed class were exposed to the same version of the package label, because
there were at least 32 label variations used during the class period. *See* Docket No. 61-2 at 2-3.
Vizcarra has pointed to no evidence showing that all proposed class members were exposed to the
same version of the package label. *See* Docket No. 47 at 2.

1 Representations’), [Vizcarra] believed the Product’s vanilla flavor came only from the vanilla
2 plant.”); *id.* at 8-9 (arguing that the typicality requirement is met because Vizcarra and the
3 proposed class members “believed based on the Vanilla Representations that all of the vanilla
4 flavor of the Product was from the vanilla plant” and “paid a price premium based on the Vanilla
5 Representations”). The Court agrees with Unilever that the first time that Vizcarra contended that
6 her theory of liability was based on the entire label was in her reply in support of her motion for
7 class certification.

8 Having concluded that Vizcarra’s theory of liability is premised on the Vanilla
9 Representations, the Court now turns to the issue of whether Vizcarra has shown that common
10 evidence can resolve the question of whether a reasonable consumer was likely to be deceived *by*
11 *the Vanilla Representations*. The only common evidence to which she has pointed is the report of
12 Dr. Dennis. As noted, however, Unilever has pointed to evidence of its own in the form of the
13 opinions of Dr. Toubia, which, if credited, negate or at the very least undermine Dr. Dennis’
14 opinions.

15 Where, as here, there is conflicting evidence presented for and against a requirement for
16 class certification, under Ninth Circuit law, the Court must “judg[e] the persuasiveness of the
17 evidence presented” and “resolve any factual disputes necessary to determine whether” the
18 requirements of Rule 23 have been satisfied. *Ellis*, 657 F.3d at 982-83; *see also Grodzitsky*, 957
19 F.3d at 986 (holding that “[a] district court errs when it ‘limit[s] its analysis of whether there was
20 commonality to a determination of whether Plaintiffs’ evidence on that point was admissible’ and
21 that a ‘district court must engage in a ‘rigorous analysis’ of commonality, rather than ‘merely
22 conclud[ing] that, because . . . evidence was admissible, a finding of commonality was
23 appropriate’” (quoting *Ellis*, 657 F.3d at 984)).

24 Here, it is undisputed that Dr. Dennis’ consumer perceptions survey did not specifically
25 test the effect of the Vanilla Representations on consumers’ expectations or beliefs; instead, it
26 tested the effect of *the entire package*, which contained the Vanilla representations *as well as* other
27 statements and elements that are not at issue in this action. Dr. Toubia opines, and Vizcarra has
28 not disputed, that because Dr. Dennis did not specifically test the effect of the Vanilla

1 Representations, the results of his survey do not speak as to whether consumers' expectations as to
2 the vanilla content of the ice cream at issue were caused by any of the Vanilla Representations, as
3 opposed to something else, such as other aspects of the packaging that Vizcarra did not challenge
4 in the complaint. In fact, Dr. Dennis himself admitted that this is the case. *See* Dennis Dep. Tr. at
5 57 ("I did not attempt to isolate any one of these vanilla representations. So, therefore, my survey
6 results to date are, are speaking to the entire packaging there."). In light of this, the Court cannot
7 find that Dr. Dennis' opinions constitute common proof that could resolve the question of whether
8 a reasonable consumer was likely to be deceived by the Vanilla Representations.

9 *Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2014 WL 2702726, at *16-17 (N.D.
10 Cal. June 13, 2014) (Breyer, J.), which Unilever cited in its briefs but Vizcarra has neither
11 addressed nor distinguished, is instructive. There, the court held that the plaintiff had not shown
12 that the question of likelihood of deception as to the use of the label "natural," which was the
13 alleged misrepresentation at issue in the case, could be answered with common proof because the
14 plaintiff pointed to no common evidence showing that consumers understood the word "natural"
15 in the manner alleged in the complaint. The court reasoned that, "even if the challenged
16 statements were facially uniform, consumers' understanding of those representations would not
17 be" because "there is no fixed meaning for the word 'natural'" and the plaintiff had not shown that
18 the term had any particular meaning in the minds of consumers. *Id.* at *17.

19 Similarly, here, Vizcarra has pointed to no common evidence showing that consumers
20 understood the Vanilla Representations—which are comprised of the term "natural vanilla," and
21 images of two vanilla beans, vanilla flowers, and a scoop of the ice cream with black specks—as
22 indicating that the ice cream at issue would be flavored exclusively with vanilla from the vanilla
23 plant. As discussed above, Dr. Dennis' survey did not test the effect of the Vanilla
24 Representations, and instead tested the entire package, which contains other statements and
25 elements that are not challenged in the complaint and, therefore, the survey says nothing as to
26 whether the survey respondents' expectations as to the ice cream at issue were caused by the
27 Vanilla Representations as opposed to something else that is not at issue in this action. In the
28

1 absence of evidence or authority to the contrary, it appears that the Vanilla representations have no
2 “fixed meaning,” just like the “natural” label at issue in *Jones*.

3 Vizcarra cites *Kumar v. Salov N. Am. Corp.*, No. 14-CV-2411-YGR, 2016 WL 3844334, at
4 *8 (N.D. Cal. July 15, 2016) for the proposition that this Court previously held that, to satisfy the
5 commonality element, a plaintiff need only show that there were “identical statements on the
6 labels of the products at issue,” because, when that is the case, the answer to the question of
7 whether a reasonable consumer is likely to be deceived will “be based on common facts.” *Kumar*
8 is distinguishable. In *Kumar*, the allegedly misleading statement was a label of origin, namely
9 “imported from Italy.” In concluding that the question of likelihood of deception was susceptible
10 to common proof, the Court distinguished the “imported from Italy” label at issue from the
11 “natural” label that was at issue in *Jones*, 2014 WL 2702726, at *15, the case discussed above.
12 This Court reasoned that the challenged statement “imported from Italy,” unlike the label “natural”
13 that was at issue in *Jones*, was not inherently ambiguous and could be deceptive as a matter of law
14 in light of case law indicating that government regulation of the “use of [labels of origin] suggests
15 that [a label of origin] can be used in misleading ways.” *See id.* at *9 (citations omitted). Here,
16 unlike in *Kumar*, the Vanilla Representations are not labels of origin that are subject to
17 government regulation and specific case law suggesting that they could be deceptive as a matter of
18 law. Further, unlike the label at issue in *Kumar*, the Vanilla Representations are inherently
19 ambiguous, like the “natural” label at issue in *Jones*.

20 Vizcarra also relies on *Bailey v. Rite Aid Corp.*, 338 F.R.D. 390, 399 (N.D. Cal. 2021) and
21 *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 326 F.R.D. 592, 612 (N.D. Cal. 2018), which
22 also are distinguishable. There, and unlike here, the plaintiff pointed to common evidence that
23 could resolve the question of whether a reasonable consumer is likely to be deceived by the
24 alleged representations at issue. *See Bailey*, 338 F.R.D. at 399 (common evidence was marketing
25 expert’s declaration and deposition testimony of defendant’s representative); *Fitzhenry-Russel*, 326
26 F.R.D. at 612 (common evidence was survey evidence that tested the effect of the alleged
27 misrepresentation at issue on consumers’ understanding of the product).

1 Contrary to what Vizcarra suggests, the fact that the question of likelihood of deception
2 under the UCL and FAL is subject to the reasonable consumer standard does not necessarily mean
3 that evidence is not required to establish likelihood of deception. “Whether a statement or
4 advertisement is likely to mislead is generally a question of fact,” *Patricia A. Murray Dental*
5 *Corp. v. Dentsply Internat.*, Inc., 19 Cal. App. 5th 258, 272 (2018), and the plaintiff bears an
6 “evidentiary burden” to demonstrate, consistent with the definition of likelihood of deception set
7 forth in *Lavie*, 105 Cal. App. 4th at 508, “that it is probable that a significant portion of the
8 consuming public could be confused by the [allegedly misleading] labeling of defendants’
9 products,” *Ries v. Arizona Beverages USA LLC*, No. 10-01139 RS, 2013 WL 1287416, at *7 (N.D.
10 Cal. Mar. 28, 2013) (granting motion to decertify class and motion summary judgment in favor of
11 defendants on claims under the UCL, FAL, and CLRA in part because plaintiffs failed to meet
12 their “evidentiary burden” to prove that a reasonable consumer was likely to be deceived by
13 “natural” labels on beverages). Evidence that may be relevant to the factual determination of
14 whether a statement or advertisement is likely to deceive a reasonable consumer under *Lavie*
15 includes, but is not limited to, evidence regarding the knowledge base of the targeted consumer
16 (which is relevant to the determination of the reasonableness of the consumer), *Patricia A.*
17 *Murray*, 19 Cal. App. 5th at 272; the advertisement itself, *id.*; and evidence of “actual confusion,”
18 *see Brockey v. Moore*, 107 Cal. App. 4th 86, 99-100 (2003).

19 In light of these authorities, and where, as here, the plaintiff has not shown that the alleged
20 misrepresentations could be deceptive as a matter of law (as may be the case with labels of origin),
21 the plaintiff must point to common evidence other than the alleged misrepresentations themselves
22 to establish that the question of likelihood of deception can be resolved on a classwide basis.
23 Other than Dr. Dennis’ opinions, which do not speak as to the likelihood of deception resulting
24 from the Vanilla Representations, Vizcarra has pointed to no other common evidence that could
25 establish likelihood of deception under *Lavie*. A finding that the commonality requirement is not
26 met, and a denial of certification as to Vizcarra’s claims under the UCL and FAL is, therefore,
27 warranted. *See Grodzitsky*, 957 F.3d at 986-87 (holding that, where the district court could not
28 rely on an expert’s testimony to find that the requirement of commonality was met, and the

1 plaintiff pointed to no other common evidence to satisfy the commonality requirement, it was
2 appropriate for the district court to deny certification).

3 **ii. CLRA and Materiality**

4 The CLRA prohibits “unfair methods of competition and unfair or deceptive acts or
5 practices.” Cal. Civ. Code § 1770. The requirements for stating a claim under the CLRA differ
6 from those for a claim under the UCL and FAL because a CLRA plaintiff can obtain damages, as
7 well as equitable relief and other remedies. Cal. Civ. Code § 1780(a). A CLRA plaintiff must
8 “show not only that a defendant’s conduct was deceptive but that the deception caused them
9 harm.” *Stearns*, 655 F.3d at 1022 (citing *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129
10 (2009)). In other words, “[a] CLRA claim warrants an analysis different from a UCL [and FAL]
11 claim because the CLRA requires each class member to have an actual injury caused by the
12 unlawful practice.” *Id.* (citation omitted). That said, “[c]ausation, on a classwide basis, may be
13 established by materiality. If the trial court finds that material misrepresentations have been made
14 to the entire class, an inference of reliance arises as to the class.” *Id.* (quoting *In re Vioxx Class*
15 *Cases*, 180 Cal. App. 4th at 129) (emphasis added). “A misrepresentation is judged to be
16 ‘material’ if a reasonable [person] would attach importance to its existence or nonexistence in
17 determining his choice of action in the transaction in question.” *Kwikset*, 51 Cal. 4th at 332
18 (citation omitted). “Whether a misrepresentation is sufficiently material to allow for an inference
19 of reliance is generally a question of fact[.]” *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007,
20 1021 (9th Cir. 2020) (citation omitted). “If the misrepresentation or omission is not material as to
21 all class members, the issue of reliance ‘would vary from consumer to consumer’ and the class
22 should not be certified.” *Stearns*, 655 F.3d at 1022–23 (citing *In re Vioxx Class Cases*, 180 Cal.
23 App. at 129).

24 Vizcarra argues that the question of whether the Vanilla Representations would be material
25 to a reasonable consumer is capable of resolution with common proof based on the opinions of Dr.
26 Dennis. *See* Docket No. 48-4 at 4. As discussed above, in the second part of his report, Dr.
27 Dennis sought to determine “any materiality associated with consumers’ preference to purchase
28 Product for which all the vanilla flavor comes from vanilla extract (made from the vanilla plant).”

1 Dennis Report ¶ 73. According to Vizcarra, Dr. Dennis' materiality study "measured consumers'"
2 preference to purchase either the Product for which (i) all the vanilla flavor comes from vanilla
3 extract (made from the vanilla plant) or (ii) not all the vanilla flavor comes from vanilla extract
4 (made from the vanilla plant)." Docket No. 59 at 6 (citing Dennis Report ¶ 59). Dr. Dennis
5 concluded that 88.6% of respondents indicated that they would prefer a product for which all of
6 the vanilla flavor comes from vanilla extract (made from the vanilla plant), while only 6.7%
7 reported that they would prefer to purchase a product for which not all of the vanilla flavor comes
8 from vanilla extract. Based on these results, Dr. Dennis concluded "that the alleged
9 misrepresentations are material to purchase decision making [sic] for a reasonable consumer in the
10 state of California." *Id.* ¶ 75.

11 Unilever argues that Dr. Dennis' opinions do not constitute common proof of whether the
12 Vanilla Representations are material to a reasonable consumer because Dr. Dennis did not test the
13 Vanilla Representations to determine whether they are material to consumers' decision to purchase
14 the ice cream at issue. Unilever contends that Dr. Dennis instead showed consumers two identical
15 images of the entire packaging of the ice cream at issue and told them to choose between one
16 hypothetical product that that was presented as having "all" of its vanilla flavor coming from the
17 vanilla plant, and another hypothetical product presented as having "not all" of its vanilla flavor
18 coming from the vanilla plant. Dr. Toubia, who analyzed the validity of Dr. Dennis' report,
19 opines that Dr. Dennis' "Materiality Survey does not examine how 'the use of the words 'Natural
20 Vanilla,' the image of vanilla plant flowers, the image of vanilla beans, and the image of ice cream
21 with black specks' on the packaging of the Breyers product affect consumer purchase decisions."
22 Docket No. 54-1 ¶ 42. Accordingly, Dr. Toubia concludes that Dr. Dennis' materiality survey
23 cannot measure whether the Vanilla Representations matter to consumers when it comes to
24 purchasing the ice cream at issue. *Id.* ¶¶ 43-46.

25 Again, Vizcarra does not dispute that Dr. Dennis did not test or isolate the effect of the
26 Vanilla Representations on consumers' decision to purchase the ice cream at issue. In reply,
27 Vizcarra merely repeats the same arguments as made with respect to the question of likelihood of
28 deception, namely that Unilever does not dispute that the question of materiality can be resolved

1 with common proof, and that her theory of liability is premised on the entire package of the ice
2 cream at issue.

3 The Court finds that Unilever *does* dispute the issue of whether Vizcarra has shown that
4 the question of materiality can be resolved with common proof, and that Vizcarra's theory of
5 liability is based on the Vanilla Representations and not on the entire label of the ice cream at
6 issue.

7 The Court agrees with Unilever that Dr. Dennis' opinions are not capable of answering the
8 question of whether a reasonable consumer would find the Vanilla Representations material when
9 purchasing the product at issue. *Jones*, 2014 WL 2702726, at *15, is instructive. There, the court
10 held that the testimony of plaintiffs' expert could not resolve the question of whether the
11 challenged statements would be material to a reasonable consumer because the expert, among
12 other things, "did not explain how the challenged statements, together or alone, were a factor in
13 any consumer's purchasing decisions." *Id.* Vizcarra has not addressed or distinguished *Jones*.

14 As in *Jones*, Dr. Dennis here has not explained how the Vanilla Representations, together
15 or alone, would impact a consumer's decision to purchase the ice cream at issue. Nor could he.
16 As discussed above, Dr. Dennis admitted during his deposition that he did not test the effect of the
17 Vanilla Representations. Further, Dr. Toubia, whose opinions are unchallenged, opines that Dr.
18 Dennis' failure to test the Vanilla Representations means that Dr. Dennis' materiality survey
19 cannot measure whether the Vanilla Representations matter to consumers when it comes to
20 purchasing the ice cream at issue. Docket No. 54-1 ¶¶ 42-46. Accordingly, Dr. Dennis' opinions
21 have no bearing on the question of whether the Vanilla Representations were material to a
22 reasonable person when purchasing the ice cream at issue.

23 Because Vizcarra has not pointed to any other common evidence that can answer the
24 question of whether the Vanilla Representations were material to a reasonable consumer, the Court
25 finds that she has not shown that this question is capable of resolution on a classwide basis and
26 that certification should be denied as to Vizcarra's CLRA claim. *See Badella v. Deniro Mktg.*
27 *LLC*, No., 10-cv-3908, 2011 WL 5358400, at *9 (N.D. Cal. Nov. 4, 2011) (holding
28 that "[m]ateriality is an objective standard, but still, Plaintiffs will need to point to some type of

1 common proof" in order to meet their burden to show that materiality is a question that can be
2 resolved with common proof); *see also Stearns*, 655 F.3d at 1022–23 (“If the misrepresentation or
3 omission is not material as to all class members, the issue of reliance ‘would vary from consumer
4 to consumer’ and the class should not be certified.”).

5 **3. Typicality**

6 “The purpose of the typicality requirement is to assure that the interest of the named
7 representative aligns with the interests of the class.” *Stearns*, 655 F.3d at 1019. “The typicality
8 requirement looks to whether the claims of the class representatives [are] typical of those of the
9 class, and [is] satisfied when each class member’s claim arises from the same course of events,
10 and each class member makes similar legal arguments to prove the defendant’s liability.” *Id.*
11 (citation omitted). “Typicality refers to the nature of the claim or defense of the class
12 representative, and not to the specific facts from which it arose or the relief sought.” *Hanon v.*
13 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal citation and quotation marks
14 omitted). Typicality may be lacking “if ‘there is a danger that absent class members will suffer
15 [because] their representative is preoccupied with defenses unique to it.’” *Id.* (citation omitted).

16 Vizcarra argues that the typicality requirement is satisfied because:

17 She, like all class members: purchased the Product during the
18 Class Period that Defendant had labeled with the Vanilla
19 Representations; believed based on the Vanilla Representations
20 that all of the vanilla flavor of the Product was from the vanilla
plant; paid a price premium based on the Vanilla Representations;
and seeks damages, restitution, and injunctive relief.

21 Docket No. 48-4 at 9.

22 Unilever does not dispute that the typicality requirement is satisfied.

23 In the absence of any dispute, the Court finds that Vizcarra has sufficiently shown that her
24 claims and experience with the ice cream at issue are typical of those of the proposed class
25 members and that the typicality requirement is, therefore, met.

26 **4. Adequacy of Representation**

27 The requirement of adequate representation requires a showing that the representative
28 parties “will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4).

1 This requires inquiry into whether the plaintiff and its counsel have any conflicts of interest with
2 other class members, and whether the plaintiff and its counsel will prosecute the action vigorously
3 on behalf of the class. *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003).

4 Vizcarra argues that she and her counsel, Reese LLP and Sheehan & Associates, P.C.,
5 satisfy this requirement because (1) there are no conflicts between herself, her counsel, and the
6 proposed class members; and (2) she and her counsel will prosecute the action vigorously on
7 behalf of the proposed class members. Docket No. 48-4 at 9-10.

8 Unilever argues that the adequacy-of-representation requirement is not satisfied because
9 Vizcarra's counsel are unlikely to prosecute the action vigorously on behalf of the proposed class,
10 as they have dismissed other proposed class actions before an unfavorable decision was issued in
11 those cases.

12 The Court finds that Unilever's assertions with respect to the willingness of counsel to
13 vigorously prosecute this action are speculative and, therefore, unpersuasive. The Court finds no
14 cause for concern with respect to counsel's ability and willingness to fairly and adequately protect
15 the interests of the proposed class. The record in this action shows that counsel have prosecuted
16 this action vigorously, as demonstrated, for example, by their successful opposition to Unilever's
17 motion to dismiss. Additionally, both Reese LLP and Sheehan & Associates, P.C. have extensive
18 experience successfully prosecuting consumer protection class actions such as this one. *See*
19 Docket No. 58 at 4.

20 Accordingly, the Court finds that the adequacy-of-representation requirement is met as to
21 both Vizcarra and her counsel.

22 **B. Rule 23(b)**

23 **1. Rule 23(b)(2)**

24 Rule 23(b)(2) permits certification of a class when "the party opposing the class has acted
25 or refused to act on grounds that apply generally to the class, so that final injunctive relief or
26 corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P.
27 23(b)(2). "Class certification under Rule 23(b)(2) is appropriate only where the primary relief
28

1 sought is declaratory or injunctive.” *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1195 (9th
2 Cir.), *opinion amended on denial of reh’g*, 273 F.3d 1266 (9th Cir. 2001).

3 Here, plaintiff contends that Rule 23(b)(2) certification would be appropriate because the
4 remedy she seeks is “class-wide, homogenous injunctive relief, namely, changes to the Product’s
5 label to cure the deception.” Docket No. 48-4 at 10.

6 Defendant does not dispute that the requirements of Rule 23(b)(2) are met based on
7 plaintiff’s showing.

8 In the absence of any dispute that the injunctive relief that Vizcarra seeks would apply to
9 the proposed class as a whole and would be appropriate as a result of alleged uniform conduct by
10 Unilever affecting the entire proposed class, the Court finds that Vizcarra has satisfied the
11 requirements of Rule 23(b)(2). For the reasons discussed above, however, a Rule 23(b)(2) class
12 cannot be certified at this juncture because of Vizcarra’s failure to satisfy the commonality
13 requirement.

14 2. Rule 23(b)(3)

15 Under Rule 23(b)(3), a plaintiff must show that “the questions of law or fact common to
16 class members predominate over any questions affecting only individual members, and that a class
17 action is superior to other available methods for fairly and efficiently adjudicating the
18 controversy.” Fed. R. Civ. P. 23(b)(3).

19 a. Predominance

20 Rule 23(b)(3) requires the Court to determine whether “questions of law or fact common to
21 class members predominate over any questions affecting only individual members.” Fed. R. Civ.
22 P. 23(b)(3). “An individual question is one where ‘members of a proposed class will need to
23 present evidence that varies from member to member,’ while a common question is one where ‘the
24 same evidence will suffice for each member to make a *prima facie* showing [or] the issue is
25 susceptible to generalized, class-wide proof.’” *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442,
26 453 (2016) (citation omitted). The “predominance inquiry asks whether the common,
27 aggregation-enabling, issues in the case are more prevalent or important than the non-common,
28 aggregation-defeating, individual issues.” *Id.* (quoting 2 W. Rubenstein, *Newberg on Class*

1 Actions § 4:49 (5th ed. 2012)). “When ‘one or more of the central issues in the action are
2 common to the class and can be said to predominate, the action may be considered proper under
3 Rule 23(b)(3) even though other important matters will have to be tried separately, such as
4 damages or some affirmative defenses peculiar to some individual class members.’” *Id.* (quoting
5 7AA C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1778 (3d ed. 2005)).

6 “Considering whether ‘questions of law or fact common to class members predominate’
7 begins, of course, with the elements of the underlying cause of action.” *Erica P. John Fund, Inc.,*
8 *v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011).

9 As noted above, the claims at issue are under the UCL, FAL, and CLRA.

10 **i. UCL, FAL, and CLRA**

11 Vizcarra argues that the predominance requirement is met with respect to her claims under
12 the UCL, FAL, and CLRA, because the questions that Vizcarra contends are capable of class-wide
13 resolution with common proof, namely likelihood of deception and materiality, predominate over
14 individual questions.

15 Here, as discussed above, Vizcarra has not shown that the two questions central to a claim
16 under the UCL and FAL, on the one hand, and the CLRA, on the other hand, namely likelihood of
17 deception and materiality, respectively, are susceptible to resolution with common proof.
18 Accordingly, the Court cannot conclude that common questions predominate over individual ones
19 with respect to Vizcarra’s claims under the UCL, FAL, and CLRA.

20 The authorities that Vizcarra relies upon to try to show that the predominance requirement
21 is met are distinguishable. *See* Docket No. 58 at 9. In those cases, and unlike here, the plaintiff
22 showed that the questions of likelihood of deception and materiality, which, as noted, address the
23 most critical elements of claims under the UCL, FAL, and CLRA, could be resolved with common
24 proof. In light of that showing, the courts concluded that common questions predominated over
25 individual ones as to the UCL, FAL, and CLRA claims. *See, e.g., Hadley v. Kellogg Sales Co.*,
26 324 F. Supp. 3d 1084, 1115 (N.D. Cal. 2018) (holding that predominance requirement was met as
27 to claims under the FAL, CLRA, and UCL in part because the plaintiff had shown that likelihood
28 of deception and materiality could be resolved on a classwide basis based on expert testimony and

1 defendant's own internal documents); *Broomfield v. Craft Brew All., Inc.*, No. 17-CV-01027-BLF,
2 2018 WL 4952519, at *11 (N.D. Cal. Sept. 25, 2018) (same based on expert testimony that the
3 court found persuasive and defendants' admissions); *Bailey*, 338 F.R.D. at 407-08 (same based on
4 expert and other deposition testimony); *Mullins v. Premier Nutrition Corp.*, No. 13-CV-01271-RS,
5 2016 WL 1535057, at *5 (N.D. Cal. Apr. 15, 2016) (same based on the defendants' own
6 marketing research and surveys).

7 Vizcarra's argument that Unilever's challenges to the validity of Dr. Dennis' opinions
8 cannot defeat predominance because plaintiff is not required to prove likelihood of deception or
9 materiality at the class certification stage misses the point. Here, the Court's conclusions are not
10 predicated on a finding that Vizcarra has failed to *prove* likelihood of deception or materiality;
11 rather, they are based on a finding that Vizcarra has failed to point to common proof that is
12 *capable* of answering those questions on a classwide basis. As noted above, the Court is required
13 to judge the persuasiveness of evidence offered in favor and against class certification, and to
14 resolve any factual disputes necessary to determine whether the Rule 23 requirements have been
15 met. *See Ellis*, 657 F.3d at 984; *Grodzitsky*, 957 F.3d at 986. Here, for the reasons discussed
16 above, the opinions of Unilever's expert, Dr. Toubia, which are unchallenged, negate any
17 persuasive value that could be accorded to Dr. Dennis' opinions in the context of the class
18 certification inquiry.

19 In sum, the Court finds that Vizcarra has not shown that the predominance requirement is
20 met as to her claims under the UCL, FAL, and CLRA.

21 **ii. Damages**

22 A plaintiff seeking certification under Rule 23(b)(3) must show that damages are capable
23 of measurement on a classwide basis. *Comcast*, 569 U.S. at 35. In *Comcast*, the Supreme Court
24 held that, to meet the predominance requirement, the plaintiff must proffer a damages model
25 showing that "damages are susceptible of measurement across the entire class for purposes of Rule
26 23(b)(3)." *Id.* While the model "must measure only those damages attributable to" the plaintiff's
27 theory of liability, *id.*, the calculations "need not be exact" at the certification stage, *id.* A plaintiff
28 must only "show that [its] damages stemmed from the defendant's actions that created the legal

1 liability," *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013); *see also Pulaski &*

2 *Middleman*, 802 F.3d at 987 ("[T]he mere fact that there might be differences in damage

3 calculations [across individual members of a class] is not sufficient to defeat class certification.")

4 (citation omitted).

5 The damages and restitution owed to a plaintiff pursuant to the CLRA, and UCL and FAL,

6 respectively, is based on the difference between the price the consumer paid and the price a

7 consumer would have been willing to pay for the product had it been labeled accurately. *Pulaski*

8 & *Middleman*, 802 F.3d at 988-89. In other words, "the focus is on the difference between what

9 was paid and what a reasonable consumer would have paid at the time of purchase without the

10 fraudulent or omitted information." *Id.* (citing *Kwikset*, 51 Cal. App. 4th at 329).

11 Vizcarra's proposed damages model is the one described in the third part of Dr. Dennis'

12 report. Dr. Dennis proposes a choice-based conjoint analysis to measure the price premium

13 associated with the Vanilla Representations that is based on acceptable methodologies for

14 conducting choice-based conjoint analyses. Vizcarra contends that, because numerous courts have

15 "approved conjoint analysis as a methodology to determine the price attributable to a

16 misrepresentation on a product label," Docket No. 48-4, this Court should do the same here with

17 respect to Dr. Dennis' proposed conjoint analysis.

18 Unilever argues that Dr. Dennis' proposed conjoint analysis is insufficient to satisfy

19 *Comcast*'s requirement that it measure damages consistent with Vizcarra's theory of liability

20 because the proposed conjoint analysis will not test or isolate any price premium caused by the

21 Vanilla Representations. Unilever also argues Dr. Dennis' proposed conjoint analysis lacks

22 "enough particularity for the Court to conduct the necessary evaluation under" *Olean Wholesale*

23 *Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774 (9th Cir. 2021)⁵, which requires a

24 court to ensure that a proposed damages analysis will be capable of measuring a classwide injury

25 and would not sweep in more than a *de minimis* number of proposed class members who were

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27 ⁵ *Olean* was vacated on August 3, 2021, so that it can be reheard en banc. *See Olean*

28 *Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods*, 5 F.4th 950, 2021 WL 3355496 (9th

Cir. 2021) (unpublished memorandum). Accordingly, the Court does not consider here any

arguments that are predicated on that opinion.

1 uninjured; and (3) Dr. Dennis' proposed analysis will not take into account supply-side factors.

2 In mislabeling cases where the injury suffered by consumers was in the form of an
3 overpayment (or price premium) resulting from the alleged misrepresentation at issue, courts
4 routinely hold that choice-based conjoint models that are designed to measure the amount of
5 overpayment arising out of the alleged malpresentation at issue satisfy *Comcast*'s requirements.
6 *See, e.g., Zakaria v. Gerber Prod. Co.*, No. LACV1500200JAKEX, 2017 WL 9512587, at *17
7 (C.D. Cal. Aug. 9, 2017), *aff'd*, 755 F. App'x 623 (9th Cir. 2018) (holding that a conjoint analysis
8 that purported to measure consumers' overpayment caused by alleged misrepresentations satisfied
9 *Comcast* because it was consistent with the theory of liability that the alleged misrepresentations
10 caused consumers to suffer economic losses in the form of overpayment).

11 Here, however, Vizcarra has not shown that Dr. Dennis' proposed conjoint analysis would
12 measure a price premium consistent with her theory of liability as required by *Comcast*. Unilever
13 argues, and Vizcarra does not dispute, that Dennis' proposed conjoint analysis does not test or
14 isolate the price premium, if any, resulting from the Vanilla Representations. It is undisputed that
15 Dr. Dennis instead will measure any price premium associated with what Dr. Dennis describes as
16 "source of vanilla flavor," which has no specific connection to the Vanilla Representations
17 according to Dr. Toubia. *See* Toubia Rep. ¶ 75 n.109. Dr. Dennis himself confirmed this during
18 his deposition. *See* Dennis Dep. Tr. at 59-61 (admitting that his current design for his proposed
19 conjoint study will not isolate a price premium associated specifically with the Vanilla
20 Representations and will instead "isolate any economic value that is associated with this attribute
21 *source of vanilla flavor* and answer empirically whether consumers care or not and how much do
22 they care economically about what the source is") (emphasis added); *see also id.* at 60 ("Q. So
23 your conjoint survey is not directly testing the price premium that consumers would pay as a result
24 of those four vanilla representations; correct? A. I think the, well, it's going to depend ultimately
25 on how I make final decisions on the design of the conjoint survey and whether I find it practical
26 and desirable to be able to show these images that you talked about and show them as attributes.
27 *My current plan is not to show those, those design elements.*") (emphasis added). This alone
28 warrants denying certification of the proposed Rule 23(b)(3) class on the basis that the proposed

1 method for calculating damages does not fit Vizcarra’s theory of liability and therefore is
2 inconsistent with *Comcast*.

3 *McMorrow v. Mondelez Int’l, Inc.*, 3:17-cv-2327-BAS-JLB, 2020 WL 1157191, at *5-9
4 (S.D. Cal. March 9, 2020), which Unilever cited in its briefs, is instructive. There, the court
5 denied a motion for certification on the basis that the plaintiff’s proposed damages methodology,
6 which was one advanced by Dr. Dennis, did not satisfy *Comcast*’s requirement that it measure
7 damages consistent with the plaintiff’s theory of liability. The Court reasoned that the proposed
8 conjoint study would not actually measure the price premium associated with the statement that
9 the plaintiff had challenged as misleading, because it would not isolate the price premium, if any,
10 that was caused by the challenged statement. Instead of specifically testing the effect of the
11 statement that the plaintiff had challenged, namely the word “nutritious,” the proposed study
12 would test entire phrases that contained other words that the plaintiff had not challenged, namely
13 “nutritious sustained energy,” “nutritious steady energy all morning,” and “4 hours of nutritious
14 steady energy.” *Id.* at *5-9. The court reasoned that, because the proposed study would not
15 isolate the price premium resulting from the challenged word “nutritious,” the proposed study was
16 not consistent with the plaintiff’s theory of liability and, therefore, did not satisfy *Comcast*. See
17 *id.* at *19-20 (“Class certification can be denied under *Comcast* “when the proposed price
18 premium (i.e. overpayment) methodology fails to . . . isolate the premium attributable only to the
19 alleged misleading marketing statement.”) (citation omitted). After the court denied the motion
20 for certification on this basis, the plaintiff filed a renewed motion for class certification that relied
21 upon a *revised* proposed conjoint study by Dr. Dennis, and the court granted certification at that
22 point. See *McMorrow v. Mondelez Int’l, Inc.*, No. 17-CV-2327-BAS-JLB, 2021 WL 859137, at
23 *7 (S.D. Cal. Mar. 8, 2021) (granting renewed motion for class certification and noting that “Dr.
24 Dennis has redesigned the survey, this time with a proposal to isolate the price premium attached
25 to the term, “nutritious.”). Only the initial opinion in *McMorrow* is relevant here.

26 As in the first opinion in *McMorrow*, Vizcarra’s proposed methodology for calculating
27 damages does not isolate the Vanilla Representations that form the basis of her theory of liability,
28 and accordingly, it is incapable of calculating the price premium, if any, caused by those alleged

1 misrepresentations. Notably, Vizcarra has not addressed, much less distinguished, the first
2 opinion in *McMorrow*.⁶

3 Vizcarra relies on *Broomfield*, 2018 WL 4952519, at *17, for the proposition that Dr.
4 Dennis need not test the effect on consumers of the Vanilla Representations as part of his conjoint
5 analysis to satisfy *Comcast*. Docket No. 58 at 11. *Broomfield* is distinguishable. In *Broomfield*,
6 the plaintiffs alleged to have relied on many misrepresentations that appeared on the packaging of
7 beers, which led them to believe that the beers were brewed in Hawaii. *Id.* at *2. In support of
8 class certification, the plaintiffs submitted a damages model that “involve[d] a two-pronged
9 approach”: (1) first, conducting a consumer survey to test whether the alleged representations on
10 the packing lead consumers to believe that the beers are brewed in Hawaii and whether the alleged
11 representations were material to consumers’ purchasing decisions; and (2) using a choice-based
12 conjoint analysis “to test whether consumers’ belief that Kona Beer is brewed in Hawaii allows
13 [the defendant] to charge a price premium for the beers.” *Id.* at *14. The court held that this two-
14 pronged damages model was consistent with the plaintiffs’ theory of liability and, therefore, with
15 *Comcast*, because the court was persuaded that the first part of the model, the survey, could
16 establish that consumers believe that beers are from Hawaii based on the packaging, and the
17 second part of the proposed model, the conjoint analysis, “tests the impact of that belief” by
18 calculating a price premium attributed to that belief. *Id.* at *16-17. In light of this, the court held
19 that the second part of the model, the conjoint analysis, “need not have asked about the packaging
20 because that is the function of” the first part of the model, namely the survey. *Id.* at *16; *see also*
21 *id.* at * 17 (“Thanks to [the survey’s] results, the packaging is irrelevant to this final question [of
22 whether consumers have suffered injury from their belief that the beer is brewed in Hawaii], and
23 thus unnecessary to [the conjoint analysis] model”).

24 Here, there is no basis to find that testing the Vanilla Representations as part of Dr.
25 Dennis’ proposed conjoint analysis is not required based on *Broomfield*. In *Broomfield*, the
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28 ⁶ In her opposition, Vizcarra cites the *second* opinion in *McMorrow* that accepted the revised proposed conjoint study and granted certification. *See* Docket No. 58 at 10. That second opinion is not relevant here.

1 conjoint analysis could be combined with a survey that the court was persuaded was capable of
2 testing the alleged misrepresentations at issue, which, in turn, obviated the need for the conjoint
3 analysis to *again* test the alleged misrepresentations at issue. By contrast, Dr. Dennis' proposed
4 conjoint analysis here cannot be combined with the results of his survey in order to determine the
5 price premium attributable to the Vanilla Representations. This is because Dr. Dennis' survey did
6 not test the Vanilla Representations, as discussed at length above.

7 Vizcarra also argues that "any flaws regarding methodology go to weight, not
8 admissibility." Docket No. 58 at 10. This argument is unavailing because, here, the Court is not
9 analyzing the flaws of Dr. Dennis' proposed conjoint study in the context of determining the
10 admissibility of his opinions (the Court has found Dr. Dennis' opinions to be admissible). As
11 noted above, at this stage, the Court is required to judge the persuasiveness of the evidence offered
12 in support and against class certification, *see Ellis*, 657 F.3d at 984; *Grodzitsky*, 957 F.3d at 986.
13 The Court analyzes the flaws in Dr. Dennis' opinions in that context. Here, Unilever has shown,
14 based on Dr. Toubia's unchallenged opinions and the relevant authorities discussed above, that Dr.
15 Dennis' failure to isolate the price premium caused by the Vanilla Representations renders his
16 proposed conjoint study incapable of measuring damages that are consistent with Vizcarra's
17 theory of liability. *See, e.g.*, Toubia Rep. ¶ 75 n.109 ("Choosing not to measure the price premium
18 created by the accused misrepresentation would add further distance between what is alleged and
19 what [Dr. Dennis' conjoint] study actually measures.").

20 In light of the foregoing, the Court concludes that Vizcarra has not shown that damages
21 consistent with her theory of liability are capable of measurement on a classwide basis. *See*
22 *Comcast*, 569 U.S. at 35.

23 **b. Superiority**

24 Rule 23(b)(3) requires a court to consider whether a class action would be a superior
25 method of litigating the claims of the proposed class members by taking into account (A) the class
26 members' interests in individually controlling the prosecution or defense of separate actions; (B)
27 the extent and nature of any litigation concerning the controversy already begun by or against
28 class members; (C) the desirability or undesirability of concentrating the litigation of the claims in

1 the particular forum; and (D) the likely difficulties in managing a class action. Fed. R. Civ. P.
2 23(b)(3).

3 Vizcarra argues that a class action is superior to other available methods of litigating the
4 claims of the proposed class members because (1) the amounts that each proposed class member
5 can recover are not significant and are small relative to the high costs of individual litigation; (2)
6 judicial economy would be promoted and the litigation of the claims would be made more
7 efficient and practical; and (3) the prosecution of individual claims could establish inconsistent
8 standards of conduct for defendant. Docket No. 48-4 at 13.

9 Unilever does not dispute that the superiority requirement is satisfied.

10 The Court finds that the superiority requirement is met here because a class action would
11 lead to a more efficient and speedy resolution of the claims of the proposed class members, and
12 because individual class members do not have a sufficient incentive to litigate their claims
13 individually.

14 **V. CONCLUSION**

15 For the foregoing reasons, the Court **DENIES** Vizcarra's motion for class certification
16 **WITHOUT PREJUDICE**, and it **DENIES** Unilever's motion to exclude or strike the opinions of Dr.
17 Dennis. The Court **GRANTS** Unilever's motion to file a sur-reply.

18 This order terminates Docket Numbers 47, 48, 52, 55, and 61.

19 In light of this Order, the Court hereby **SETS** a compliance deadline for 9:01a.m. on
20 November 18, 2021. Five (5) business days prior to the date of the compliance deadline, the
21 parties shall file a **JOINT STATEMENT** setting forth the parties' position with respect to the
22 scheduling of this case. If compliance is complete, the compliance deadline will be taken off
23 calendar.

24 **IT IS SO ORDERED.**

25 Dated: October 27, 2021


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE